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Don't Leave us Just Yet: Forum Non Conveniens and The Federal Court's Power to Stay and Monitor Actions in the "Interest of Justice"

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DON'T LEAVE US JUST YET: *FORUM NON CONVENIENS* AND THE FEDERAL COURT'S POWER TO STAY AND MONITOR ACTIONS IN THE "INTEREST OF JUSTICE"

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The doctrine of forum non conveniens *is best understood as a means to "promote the ends of justice." However, the doctrine's modern application and its interaction with another doctrine, the doctrine of judgment enforcement, threatens foreign plaintiffs' access to justice in transnational-litigation matters. This threat is most evident in what has been termed "boomerang litigation," where foreign plaintiffs engage in a roundtrip courtroom excursion, from America to a foreign judiciary and then back to America for judgment enforcement. In the end, when the doctrine of* forum non conveniens *and the doctrine of judgment enforcement are at odds with each other, foreign plaintiffs end up empty handed while allegedly liable domestic defendants receive a windfall. This Note explores the problems presented by the modern application of the doctrine of* forum non conveniens *in the transnational litigation context and proposes a three-pronged, multifaceted approach to addressing these problems to preserve the "interest of justice."*

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I. INTRODUCTION

Imagine the following: a burglar comes into your home, ravages your dwelling to find and take what he desires, and leaves your home, not as he found it, but rather in shambles. Assume that you can show that the burglar did this to your home. How do you feel? Does your home feel like it did before? Do you want to hold the burglar accountable for this violation?

Now imagine that this burglary does not just happen over the course of one night. Instead, the burglar takes nearly twenty-six years to go through your home and take what he wants. To this prolonged invasion, add eighteen billion gallons of toxic waste left in waterways; hundreds of abandoned, nonremediated waste pits, five indigenous tribes' traditional lifestyles decimated, one tribe eradicated, and what do you have?[1] A factual recitation aptly coined the "Amazon Chernobyl."[2]

This is precisely the situation that the modern application of the doctrine of *forum non conveniens* (the "Doctrine") has left countless Ecuadorians facing at present.[3] The Doctrine's interaction with another doctrine, the doctrine of judgment enforcement, threatens to leave these foreign plaintiffs without "access to justice."[4] A brief overview of the factual circumstances that have led to years of litigation in both America and Ecuador will help to better explain this threat and why our legal system should take affirmative steps to alter it.

1. *Ecuador Court Upholds $8.6 Billion Ruling Against Chevron*, CNN (Jan. 4, 2012, 8:35 AM) [hereinafter CNN], http://www.cnn.com/2012/01/04/world/americas/ecuador-chevron-lawsuit/index.html; AMAZON DEF. COAL., *Understanding Chevron's "Amazon Chernobyl": Detailed Background on Landmark Legal Case over Chevron's Environmental Contamination in Ecuador* 7 (2009), *available at* http://amazonwatch.org/documents/ecuador-press-kit/detailed-background.pdf.

2. AMAZON DEF. COAL., *supra* note 1, at 4.

3. *See* Aguinda v. Texaco, Inc., 303 F.3d 470, 480 (2d Cir. 2002) (affirming the district court's decision to dismiss on grounds of *forum non conveniens* provided Texaco agreed to waive the statute of limitations); Patrick Radden Keefe, *Why Chevron Will Settle in Ecuador*, THE NEW YORKER (Jan. 4, 2012), http://www.newyorker.com/online/blogs/newsdesk/2012/01/why-chevron-will-settle-in-ecuador.html.

4. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1450 (2011).

In 1964, Texaco, Inc. began "oil exploration and drilling activities" for crude oil in the Oriente region of eastern Ecuador.[5] Over the next twenty-six years, Texaco constructed and developed oil wells and pipelines and produced innumerable barrels of crude oil.[6] Allegedly, Texaco's practices in the Oriente region were less than "environmentally sound" and failed to meet both accepted international standards and internal company guidelines.[7] The alleged lack of due care caused damage of "outrageous proportions" to the people and environment.[8] For example, residents of the Oriente region alleged that Texaco failed to take adequate precautions and remedial measures in their drilling operations such that "streams, rivers, lakes, and aquifers of the Oriente ha[d] become so contaminated with oil and oil by-products that the water [in the region was] unsuitable for drinking."[9] In addition, these residents claimed that nearly seventeen million gallons of oil spilled from Texaco's pipelines due to ruptures and leaks.[10] These were just two of the many environmental harms that Texaco allegedly caused.[11]

These circumstances gave rise to the 1993 complaint in *Aguinda v. Texaco, Inc.*,[12] which was filed in a federal district court for the Southern District of New York.[13] The *Aguinda* complaint alleged that Texaco had caused plaintiffs to suffer "property damage, personal injuries, increased risks of cancer and other diseases, and ha[d] resulted in the degradation and destruction of the environment in which plaintiffs and their families live[d]," all as a result of Texaco's "negligent, reckless, intentional and outrageous acts and omissions . . . in connection with its oil exploration and drilling operations [in the Oriente region]."[14] In 2001, after an eight-year

5. Complaint at 22, Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (No. 93 Civ. 7527 JSR).

6. *Id.* at 22–23.

7. *Id.* at 23.

8. *Id.*

9. *Id.* at 26.

10. *Id.* at 24 (basing the spillage amount on Ecuadorian government estimates). This is six million gallons more than the Exxon Valdez oil spill. *Id.* at 24–25; *see also* AMAZON DEF. COAL., *supra* note 1, at 4 (estimating the overall damage to be thirty times that of the Exxon Valdez spill).

11. *See* Complaint, *supra* note 5, at 23–27.

12. *Id.*

13. *Id.*

14. *Id.* at 3–4.

battle over whether Ecuador was truly an adequate alternative forum, *Aguinda* succumbed to the Doctrine and Texaco secured the dismissal it sought.[15] Texaco, the proponent of the notion that Ecuadorian courts were adequate, succeeded in arguing that the case "ha[d] everything to do with Ecuador and nothing to do with the United States."[16] As part of the 2001 dismissal, Texaco consented to the jurisdiction of the Ecuadorian courts should the plaintiffs refile the action there.[17]

The *Aguinda* plaintiffs persisted and refiled suit in an Ecuadorian court in 2003.[18] By this time, Chevron Corporation had purchased Texaco, and it was now the defendant to the action, having inherited both the good and the bad from Texaco.[19] After nearly ten more years of litigation, amid allegations of judicial corruption[20] and a related lawsuit against one of the plaintiffs' attorneys under RICO,[21] an Ecuadorian appellate court upheld an $8.6 billion ruling against Chevron in early 2012.[22]

On the surface, this seems to have been a victory for the plaintiffs. However, this was not the end of the battle. Because Chevron has no assets in Ecuador, the plaintiffs will have to search elsewhere to recover on the Ecuadorian judgment.[23] Cue the doctrine of judgment enforcement, which Chevron has vowed to take full

15. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001). The adequate-alternative-forum showing is just one of the elements required to grant a *forum non conveniens* dismissal. *Id.* at 538. Of note, this was Texaco's second motion to dismiss for *forum non conveniens*. *Id.*; *see also* Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998) (vacating the district court's judgment granting a motion to dismiss for *forum non conveniens* because it did not first secure a "commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts for purposes of this action").

16. *Aguinda*, 142 F. Supp. 2d at 537 (quoting District Judge Rakoff on the renewed motion to dismiss for *forum non conveniens*).

17. *Id.* at 538.

18. Whytock & Robertson, *supra* note 4, at 1447–48.

19. *See* Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER (Jan. 9, 2012), http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe.

20. *See id.*

21. Complaint at 1–4, Chevron Corp. v. Donziger, 2011 WL 979609 (S.D.N.Y. Feb. 1, 2011) (No. 11 Civ. 0691 LAK). RICO is the Racketeer Influence and Corrupt Organizations Act, which was a part of the Organized Crime Control Act of 1970. *See* Organized Crime Control Act of 1970, Pub L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 & 28 U.S.C.).

22. CNN, *supra* note 1 (explaining that if Chevron does not publicly apologize to Ecuador, the judgment will be doubled).

23. Keefe, *supra* note 3.

advantage of in protecting its American assets.[24] In fact, Chevron already attempted to do so by requesting an anti-enforcement injunction from the United States District Court for the Southern District of New York that would prevent enforcement of the Ecuadorian judgment *anywhere outside of Ecuador*.[25] Although the district court granted this "extraordinary and unprecedented global injunction," the Second Circuit reversed the lower court's judgment and vacated the injunction.[26]

The "Amazon Chernobyl" is not the only example of the unfortunate interaction between *forum non conveniens* and the judgment-enforcement doctrines.[27] Similar fates have befallen plaintiffs who brought suit against defendant corporations like Dole Food Company[28] and Shell Oil Company[29] for alleged injuries caused by chemical exposures, only to have their foreign judgments declared unenforceable.[30] This roundtrip courtroom excursion, from America to a foreign judiciary and back to America for judgment enforcement, has led to the evocative expression "boomerang litigation."[31]

24. *See* Keefe, *supra* note 19 (stating that Chevron has likened due process in Ecuador "to what one might find in North Korea"); Keefe, *supra* note 3 ("Chevron lawyers will . . . argue that Ecuador is corrupt and that the judgment is fraudulent, and should not be enforced.").

25. *See* Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir. 2012). Note that Chevron's argument for the injunction, in part, directly contradicted the argument that it made to support the motion to dismiss for *forum non conveniens* that prompted the case to be filed in Ecuador. *Compare* Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 594 (S.D.N.Y. 2011) ("Chevron contends that the judgment is not enforceable outside of Ecuador because (1) the Ecuadorian legal system does not provide impartial tribunals or procedures compatible with the requirements of due process of law . . . ."), *with* Brief for Appellee at 56, Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001) ("The most persuasive evidence that Ecuador can and does dispense independent and impartial justice in these cases is the record of corruption-free litigation against Texaco's subsidiary and other companies.").

26. *See Naranjo*, 667 F.3d at 234; Keefe, *supra* note 3.

27. *See generally* Whytock & Robertson, *supra* note 4, at 1447, 1474–81 (citing case examples of the "access to justice" gap that occurs when the doctrines of *forum non conveniens* and judgment enforcement collide).

28. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1352 (S.D. Fla. 2009) ("Because the judgment was 'rendered under a system which does not provide impartial tribunal[s] or procedures compatible with the requirements of due process of law,' . . . the judgment is not considered conclusive, and cannot be enforced . . . ." (quoting FLA. STAT. § 55.605(1)(a) (2009))). Dole is a Delaware corporation. *Id.* at 1311.

29. Shell Oil Co. v. Franco, 2005 WL 6184247, at *13 (C.D. Cal. Nov. 10, 2005) (granting plaintiff Shell Oil Company's motion for summary judgment and holding that the defendants' Nicaraguan judgment was unenforceable).

30. Whytock & Robertson, *supra* note 4, at 1475–76, 1478, 1480.

31. *Id.* at 1451.

Besides affecting the foreign plaintiffs who file suit in America, the interaction between these two doctrines also extends to the judiciary itself. At the heart of the doctrine of *forum non conveniens* initially was the idea of justice—that jurisdiction may be declined "in the interest of justice."[32] As is evident from the above discussion of *Aguinda* and the multitude of court proceedings in that litigation, the current application of the doctrine of *forum non conveniens* leaves serious doubts about whether the "interest of justice" is being served.

The purpose of this Note is to explore the problems presented by the modern application of the doctrine of *forum non conveniens* in the transnational litigation context and to propose a multifaceted approach to addressing these problems. Part II of this Note discusses the historical development of the federal doctrine of *forum non conveniens*, including its transition from a largely domestic doctrine to its modern application in international matters. Part III focuses on the potential judgment-enforcement obstacle that the modern federal doctrine presents for foreign plaintiffs and this obstacle's implications on the "interest of justice." Part IV proposes a scheme for addressing this problem that employs various procedural safeguards at multiple stages of the litigation.

II. THE FEDERAL DOCTRINE OF *FORUM NON CONVENIENS*

A. The Doctrine Recognized: A Formal Solution for Domestic Issues

Prior to the mid-twentieth century in America, the doctrine of *forum non conveniens* was "rarely . . . referred to by name," despite its abundant application in American case law.[33] Rising to prominence in Scotland,[34] and further developed in England,[35] the

32. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947) ("Courts of equity and of law also occasionally decline, *in the interest of justice*, to exercise jurisdiction . . . where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." (emphasis added) (quoting Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 422–23 (1932)).

33. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 2 (1929); *see also* Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 914, 918–21 (1947) (discussing various applications of the doctrine of *forum non conveniens* in early American case law).

34. *See* Blair, *supra* note 33, at 20 n.91; Braucher, *supra* note 32, at 909–10; Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 881 & n.58 (1935).

35. *See* Blair, *supra* note 33, at 20–21.

doctrine of *forum non conveniens* was created by foreign courts to provide them the discretion to invoke it in order to serve "the proper administration of justice."[36] Initially, this purpose arguably failed to translate to American courts.[37] However, a 1946 United States Supreme Court holding[38] solidified the notion that courts can use their discretionary power to decline jurisdiction when appropriate.[39]

Accordingly, two seminal cases from the Court's 1947 Term, *Gulf Oil Corp. v. Gilbert*[40] and *Koster v. Lumbermens Mutual Casualty Co.*,[41] brought the Doctrine to the forefront of the federal judiciary and gave it two legs on which to stand.[42] Both decisions expounded on the practice as it existed at the time, solidified it further, and provided federal courts with a recognized remedy for litigant inconvenience in actions at law.[43]

1. *Gulf Oil Corp. v. Gilbert*[44]

In *Gulf Oil Corp.*, the Court began its analysis of whether a United States district court had the "inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*"[45] with a simple premise: "[T]he proposition that a court having jurisdiction must

36. *See, e.g.*, Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," [1926] Sess. Cas. (H.L.) 13 (Scot.); Logan v. Bank of Scotland, [1906] 1 K.B. 141 (C. A. 1905). Although *Société* appears to suggest that the convenience of the parties was a central focus of the doctrinal inquiry, the various criteria considered were merely to effectuate "the proper administration of justice [by] fixing the appropriate forum for trial." Dainow, *supra* note 34, at 881–82.

37. Braucher, *supra* note 33, at 912–13. *But see* Blair, *supra* note 33, at 1, 22.

38. *See* Williams v. Green Bay & W. R.R. Co., 326 U.S. 549 (1946). In *Williams*, the Court aimed to put the Doctrine in "proper perspective" when it refused to dismiss the case based on the difficulty of determining state law. *Id.* at 554; *see* Braucher, *supra* note 33, at 922.

39. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

40. 330 U.S. 501 (1947).

41. 330 U.S. 518 (1947).

42. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981) ("The [*forum non conveniens*] doctrine became firmly established when *Gilbert* and *Koster* were decided . . . ."); 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828.1 (3d ed. 2011) ("[The *Gulf Oil Corp.*] decision firmly entrenched the doctrine of forum non conveniens in the federal courts.").

43. *See Gulf Oil Corp.*, 330 U.S. 501; *Koster*, 330 U.S. 518.

44. Plaintiff Gilbert, a Virginia resident, filed a tort claim in a New York federal district court against defendant Gulf Oil Corporation, a Pennsylvania corporation doing business in Virginia and New York, for events occurring in Virginia. *Gulf Oil Corp.*, 330 U.S. at 502. Defendant successfully invoked the doctrine of *forum non conveniens*, claiming the appropriate place for trial was Virginia. *Id.* at 512.

45. *Id.* at 502.

exercise it, is not universally true . . . ."[46] In the "interest of justice," courts of equity and of law had declined to exercise jurisdiction "where the suit [was] between aliens or non-residents or where for kindred reasons the litigation [should] more appropriately be conducted in a foreign tribunal."[47] The exercise of jurisdictional discretion sparked debate about the extent of such a "power"—one that was made evident in Justice Black's vehement dissent to the 5–4 *Gulf Oil Corp.* decision.[48] However, limiting a court's power to dismiss under *forum non conveniens* to courts with equitable jurisdiction proved unsatisfactory after the "merger of law and equity under the Rules of Civil Procedure in 1938."[49]

The *Gulf Oil Corp.* decision resolved this debate by holding that *forum non conveniens* could be used not only in courts of equity but also in courts of law.[50] The Court stated that while it had recognized and approved the Doctrine's name, it never had rejected the Doctrine's application to actions at law, an extension it viewed as necessary.[51] Writing the opinion for the Court, Justice Jackson summarized the then-current state of the Doctrine for actions at law: "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[52] Unlike Justice Black, the majority did not believe leaving such discretion to the courts would "result in many abuses" at the hands of the judiciary.[53]

Recognizing the concern that federal courts would have to exercise discretion in determining whether to grant a *forum non*

46. *Id.* at 504 (quoting Can. Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 422 (1932)).

47. *Id.* (quoting *Can. Malting Co.*, 285 U.S. at 423).

48. *Id.* at 513 (Black, J., dissenting) ("[T]his Court has never before held contrary to the general principle that 'the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.'" (quoting Chicot Cnty. v. Sherwood, 148 U.S. 529, 534 (1893))).

49. Braucher, *supra* note 33, at 925; *see also* FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

50. *See* Braucher, *supra* note 33, at 927 ("The principle is simply that a court may resist imposition on its jurisdiction." (internal quotation marks omitted)).

51. *Gulf Oil Corp.*, 330 U.S. at 505 n.4.

52. *Id.* at 507.

53. *Id.* at 508. *But see id.* at 516 (Black, J., dissenting) (stating that "[t]he Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact" and the discretion given to the federal courts "will inevitably produce a complex of close and indistinguishable decisions").

conveniens dismissal, the majority offered guidance for such decisions by providing a list of factors to consider.[54] The Court suggested that by considering both a set of private factors[55]—those interests affecting the litigant—and a set of factors concerning public interest,[56] a court could more readily make a determination regarding dismissal.[57] This balancing analysis allowed, and still allows, courts to provide a remedy in the event that the plaintiff chose the forum strictly to inconvenience the defendant.[58] The Court noted, however, that from the outset there is a strong presumption in favor of the plaintiff's choice of forum and that dismissal should not be granted "unless the balance [of these factors] is strongly in favor of the defendant."[59]

54. *Id.* at 508–09.

55. *Id.* at 508 ("Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.").

56. *Id.* at 508–09 ("Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.").

57. The full *forum non conveniens* analysis is a two-part process: the court (1) makes a determination as to "whether there is an available and adequate alternative forum," and (2) balances the private and public factors "to determine whether the court should dismiss the plaintiff's suit in favor of that alternative forum." Whytock & Robertson, *supra* note 4, at 1456. If the proposed alternative forum is not both available and adequate, then the analysis stops there and dismissal is denied. *See id.* "Overall, the alternative forum requirement does not appear to be a significant barrier to defendants' efforts to dismiss transnational litigation in favor of foreign courts." *Id.* at 1460.

58. *Gulf Oil Corp.*, 330 U.S. at 508 (citing Blair, *supra* note 33). "It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to [the plaintiff's] own right to pursue his remedy." *Id.*

59. *See id.*

2. *Koster v. Lumbermens Mutual Casualty Co.*[60]

On the heels of *Gulf Oil Corp.* came *Koster*, another *forum non conveniens* decision, this time involving multiple plaintiffs in the "internal affairs" context.[61] Like *Gulf Oil Corp.*, *Koster* dispelled the notion that a court that has jurisdiction is necessarily required to exercise it.[62] Building on the substantial evaluation of the Doctrine in *Gulf Oil Corp.*, *Koster* presented two more developments: multiple plaintiffs with equal rights to the cause of action weakened any one plaintiff's choice of forum,[63] and a trial involving issues relating to the "internal affairs of a foreign corporation" did not require dismissal.[64]

In expounding on the balancing analysis that courts should perform, the Court indicated that a plaintiff should be given the benefit of his choice of forum absent facts suggesting that the plaintiff tried to deliberately inconvenience the defendant.[65] The Court modified this presumption, however, for actions involving potentially hundreds of similarly situated plaintiffs.[66] Under those circumstances, as was the case in *Koster*, a plaintiff's presumption of an appropriate forum was "considerably weakened."[67] The Court rationalized modifying the Doctrine on the premise that to adjudicate such a matter brings with it more than the "ordinary task" of a trial; among other things, it includes far greater administrative effort in "relation to the whole group."[68]

60. Plaintiff policyholder Koster, a New York resident, filed a derivative action on behalf of all members and policyholders in a New York federal district court against defendant insurance company Lumbermens Mutual Casualty Company, a company with its principal place of business in Illinois. Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 519 (1947) Defendant successfully invoked the doctrine of *forum non conveniens*, claiming the appropriate place for trial was Illinois. *Id.* at 520, 531–32.

61. *Id.* at 518–22. Here, "internal affairs" refers to the business dealings of the defendant corporation. *See id.* at 536.

62. *Id.* at 520 n.1 (stating that previous holdings requiring exercise of jurisdiction "had nothing to do with [Koster]" and that "[w]e are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.").

63. *Id.* at 524.

64. *Id.* at 527.

65. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

66. *Koster*, 330 U.S. at 524.

67. *Id.*; *see* Braucher, *supra* note 32, at 923.

68. *See Koster*, 330 U.S. at 526.

The Court's opinion further strengthened federal courts' discretionary power by steering away from the idea that *forum non conveniens* in an "internal affairs" context required dismissal.[69] The Court stated in dicta that "[t]here is no rule of law . . . which requires dismissal . . . on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation."[70] The Court supported this by affirming that the Doctrine "resists formalization" and that the better inquiry was whether trial "best serve[d] the convenience of the parties and the ends of justice," entitling a corporation's location to "little consideration."[71] In so stating, the Court gave itself more power to dictate when it will or will not dismiss, making the Doctrine more malleable than it previously was.[72]

B. A Whole New World: From a Domestic Doctrine to an International Doctrine

In the years after the *Gulf Oil Corp.* and *Koster* decisions, the prototypical case in which the Doctrine was normally applied began to involve an international dimension.[73] As a result, the Court's 1981 decision in *Piper Aircraft Co. v. Reyno*[74] represented a fine-tuning of the *forum non conveniens* analysis, focusing the Doctrine more on foreign plaintiffs filing suit in American courts against American defendants.[75] Then, in 2007, the Court decided *Sinochem*

69. *Id.* at 527.

70. *Id.* "Foreign corporations" at this time and in this context refers to corporations with their principal place of business or "domicile" outside of the forum state. *See id.* at 526.

71. *Id.* at 527–28.

72. *Id.* at 526. It is noteworthy that the Court took this opportunity to "clarify" its power to dismiss an action. Although it dismissed this case under *forum non conveniens*, it did so entirely based on the balancing analysis described in *Gulf Oil Corp. See id.* at 535–36.

73. *See* Megan Waples, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1475 (2004) (stating that the doctrine "primarily applies in situations involving an international dimension"); *see also* 28 U.S.C. § 1404(a) (2011) (allowing district courts to transfer civil actions to another district court in the interest of justice).

74. 454 U.S. 235 (1981).

75. David Boyce, *Foreign Plaintiffs and Forum Non Conveniens*, 64 TEX. L. REV. 193, 195 (1985) (stating that *Piper Aircraft Co.* "focuses on the 'private interests' of the litigants"); *see also* Waples, *supra* note 73, at 1475 ("[T]he [*Piper Aircraft Co.*] Court gave the doctrine a much stronger focus on preventing forum shopping by foreign plaintiffs."). *See generally* 14D WRIGHT ET AL., *supra* note 42, § 3828 ("[T]the *forum non conveniens* principle has become unnecessary

International Co. v. Malaysia International Shipping Corp.,[76] a case involving the issue of whether jurisdiction must be conclusively established prior to a *forum non conveniens* dismissal.[77] Both of these cases have had a direct impact on the number of *forum non conveniens* cases courts hear and the circumstances under which they can be decided.[78]

1. Change of Venue, Change of Doctrine

The Doctrine was quickly altered after being recognized by the Supreme Court in 1947. In 1948, Congress adopted § 1404(a) of Title 28.[79] This federal transfer statute governs transfer among federal district courts "in the furtherance of justice."[80] However, it alleviated the need for the Doctrine as a means of dismissing domestic matters to other more appropriate forums.[81] As a result of § 1404(a), *forum non conveniens* faded from the judicial scene and became "only appropriate when the more convenient forum is a foreign country."[82] Thirty-three years passed before the Supreme Court issued another significant opinion on the Doctrine.[83]

in most circumstances [and] it is only appropriate when the more convenient forum is in a foreign country.").

76. 549 U.S. 422 (2007).

77. *Id.* at 425.

78. *See* Finity E. Jernigan, *Forum Non Conveniens: Whose Convenience and Justice?*, 86 TEX. L. REV. 1079, 1088–89 (2008).

79. *See* 28 U.S.C. § 1404(a) (2011).

80. Robert P. Hobson, *Forum Non Conveniens Under the United States Judicial Code*, 8 WASH. & LEE L. REV. 29, 34 (1951).

81. *See* 14D WRIGHT ET AL., *supra* note 42, § 3828 ("The addition of Section 1404(a) to the Judicial Code in 1948, which allows courts to transfer a case under certain circumstances to another federal court that is more convenient, limited the need for a forum non conveniens dismissal.").

82. *Id.*

83. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

2. *Piper Aircraft Co. v. Reyno*[84]

After *Koster* was decided in 1947 and § 1404(a) was adopted in 1948, the next Supreme Court case regarding the Doctrine to garner considerable attention was *Piper Aircraft Co.*[85] There the Court held that a plaintiff may not defeat a *forum non conveniens* dismissal merely by demonstrating that the substantive law of the alternate forum is less favorable.[86] This has led to the Doctrine becoming an "automatic defense response to transnational liability actions" and a "formidable obstacle [for] foreign plaintiffs."[87]

Unlike its predecessor, *Gulf Oil Corp.*, *Piper Aircraft Co.* found the Court focusing on the first part of the *forum non conveniens* analysis—the adequate-alternative-forum inquiry.[88] In *Piper Aircraft Co.*, the Court stated that "[t]he doctrine of *forum non conveniens* . . . [was] designed in part to help courts avoid conducting complex exercises in comparative law"[89] and reasoned that "if the possibility of an unfavorable change in substantive law [was] given substantial weight in the . . . inquiry, dismissal would rarely be proper."[90] Although the Court indicated that judges could consider an unfavorable change in substantive law,[91] it clarified that the correct measure for an inadequate alternative forum was whether "the

84. *Id.* Plaintiff Reyno, a California court-appointed representative for Scottish decedents of an aircraft crash, filed separate wrongful-death suits in a California state court against defendants Piper Aircraft Company, a Pennsylvania company, and Hartzell Propeller, Inc., an Ohio corporation, for manufacturing the aircraft and its propellers, respectively. *Id.* at 238–40. Defendants first successfully motioned for removal to the United States District Court for the Central District of California. *Id.* at 240. Piper then successfully moved to transfer to the Middle District of Pennsylvania and Hartzell had its service quashed, but was amenable to process in Pennsylvania. *Id.* at 240–41. Defendants then successfully invoked the doctrine of *forum non conveniens*, claiming the appropriate place for trial was Scotland. *Id.* at 238.

85. *Id.* at 235.

86. *Id.* at 247; *see* Jernigan, *supra* note 78, at 1090–91.

87. Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U. L. REV. 1, 52 (1991).

88. *Piper Aircraft Co.*, 454 U.S. at 254 n.22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."); Jernigan, *supra* note 78, at 1091. The *forum non conveniens* "test" involves two separate inquiries: (1) whether an alternate forum exists and (2) a balancing of private and public interests (the *Gulf Oil Corp.* factors; *see supra* Part II.A.1). *See* 14D WRIGHT ET AL., *supra* note 42, §§ 3828, 3828.3, 3828.4. Furthermore, the alternate-forum inquiry involves two separate requirements: (1) the availability of an alternative forum and (2) the adequacy of the alternative forum. *Id.* § 3828.3.

89. *Piper Aircraft Co.*, 454 U.S. at 251.

90. *Id.* at 250.

91. *Id.* at 254.

remedy offered by the other forum [was] clearly unsatisfactory," such that "it [was] no remedy at all."[92] Moreover, the Court upheld the district court's holding that the presumption favoring plaintiff's choice of forum applied with "less force" when the plaintiff was foreign.[93]

These distinctions have had an important impact on the *Gulf Oil Corp.* Court's assertion that the plaintiff's choice of forum "should rarely be disturbed," since they expanded the exceptions to the choice-of-forum presumption.[94] There has been growing concern that the Court did not consider forums with "less developed legal systems" when deciding *Piper Aircraft Co.*, suggesting that these exceptions should be limited.[95] Legal scholars have noted that because the Court has not fully described what constitutes an adequate forum since *Piper Aircraft Co.*, foreign plaintiffs from places with less developed legal systems frequently face dismissals despite showing that the alternate forum is, in essence, inadequate.[96] As a result, these foreign plaintiffs have suffered because of an adequacy standard that some consider to be too "easily satisfied."[97]

3. *Sinochem International Co. v. Malaysia International Shipping Corp.*[98]

The Court further expanded the Doctrine when it decided that under specific conditions, a court need not have jurisdiction to order a *forum non conveniens* dismissal.[99] Relying heavily on precedent,[100]

92. *Id.* at 254 & n.22 (indicating that the initial requirement of the *forum non conveniens* "test" would not be satisfied and dismissal would be improper).

93. *Id.* at 255 (referencing the presumption established in *Gulf Oil Corp.* that plaintiff's choice of forum "should rarely be disturbed" (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))).

94. Jernigan, *supra* note 78, at 1089–91.

95. *See id.* at 1092.

96. Waples, *supra* note 73, at 1476 (stating inadequacy arguments such as "procedural deficiencies and barriers, lack of resources and corruption and other political problems"); *see also* Whytock & Robertson, *supra* note 4, at 1457 (arguing that such adverse conditions render the foreign forum "inadequate" for *forum non conveniens* dismissals).

97. Whytock & Robertson, *supra* note 4, at 1457.

98. Plaintiff Malaysia International Shipping Company filed a negligent misrepresentation suit in a Pennsylvania federal district court against defendant Sinochem International Company, Limited. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 427 (2007). Defendant successfully invoked the doctrine of *forum non conveniens*, claiming the appropriate place for trial was China, without the court first determining whether or not it had jurisdiction over the matter. *Id.* at 425, 428–29.

99. *See id.* at 435–36.

the *Sinochem* Court held that if a court's jurisdictional analysis is "difficult to determine" and the *forum non conveniens* analysis weighs "heavily in favor of dismissal," then the court may dismiss without conducting the jurisdictional analysis.[101] The Court reasoned that a trial court could bypass the standard issues of personal and subject-matter jurisdiction when "considerations of convenience, fairness, and judicial economy so warrant."[102] The *Sinochem* holding, however, left unanswered the question of whether a court "conditioning a *forum non conveniens* dismissal on the waiver of jurisdictional or limitations defenses in [a] foreign forum must first determine its own authority to adjudicate the case."[103] The considerations the Court enumerated that warranted a *forum non conveniens* dismissal, combined with what the Court's holding left unanswered, will have a considerable impact on foreign plaintiffs who choose an American forum.[104] Consequently, in the relatively short time since the *Sinochem* decision, federal courts are already applying *Sinochem*'s tenets in order to dismiss cases in the transnational litigation context with some degree of frequency.[105]

100. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994) ("[T]he doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.").

101. *Sinochem Int'l Co.*, 549 U.S. at 436. The Court reasoned that if the *forum non conveniens* analysis is going to result in a dismissal anyway, then a court can properly take the "less burdensome" route so that the merits of the case may be determined elsewhere. *Id.*; *see also* Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case." (quoting *Ex parte* McCardle, 74 U.S. 506, 514 (1868)) (internal quotation marks omitted)).

102. *Sinochem Int'l Co.*, 549 U.S. at 432.

103. *Id.* at 435; 14D WRIGHT ET AL., *supra* note 42, § 3828.

104. Foreign plaintiffs filing suit against American defendants in American courts for transnational claims often find that defendants move for dismissal under *forum non conveniens* and agree to waive any jurisdictional or limitations defenses in the foreign forum (i.e., a conditional dismissal). *See* Whytock & Robertson, *supra* note 4, at 1456–57 ("Defendants routinely satisfy [the available-alternative-forum] requirement by consenting to the jurisdiction of the alternative forum as part of the forum non conveniens motion."). Dismissals seem primed to be granted given the frequent end run around the available-alternative-forum requirement by defendants; the low bar for the adequate-alternative-forum requirement, and the courts' willingness to consider convenience, fairness, and judicial economy before determining whether it has jurisdiction over the matter.

105. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 502, 503 & n.116, 504 (2011) (citing a 62 percent dismissal rate in transnational claims on *forum non conveniens* grounds since 2007).

The foregoing discussion illustrates how the Doctrine has strayed from its original purpose as a means of "proper administration of justice" to a standard that does not even require the court to have jurisdiction over the matter before dismissing it.[106]

III. GLOBALIZATION OF THE ECONOMY, GLOBALIZATION OF HARMS: THE MODERN PROBLEM OF AN OUTDATED DOCTRINE OF *FORUM NON CONVENIENS*

As it is currently applied, the Doctrine leaves wide open the possibility of a litigation/enforcement nightmare for foreign plaintiffs and a potential windfall for allegedly liable domestic defendants.[107] Specifically, the problem arises when the Doctrine interacts with the doctrine of judgment enforcement.[108] If plaintiffs are able to secure a foreign court's judgment against defendants,[109] and defendants have no assets located in that same foreign country, plaintiffs are left to enforce the foreign judgment elsewhere—usually in the United States.[110] Because the doctrine of judgment enforcement weighs criteria separately from and differently than the doctrine of *forum non conveniens*,[111] plaintiffs with a foreign-based judgment can effectively "be denied meaningful access to justice."[112] This denial of

106. *See supra* Part II.

107. *See* Christina Weston, Comment, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731, 750 (2011) ("If the corporation is successful in having the suit dismissed under [*forum non conveniens*], the corporation is dealt a lucky hand of cards . . . .").

108. *See* Whytock & Robertson, *supra* note 4, at 1450.

109. Recent trends suggest, particularly in Latin American countries, that the likelihood of plaintiffs securing foreign-based judgments against American defendant-corporations is on the rise. *See id.* at 1447; *see also* M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 BYU INT'L L. & MGMT. REV. 21, 21 (2007) ("Latin American countries are establishing regimes that are unreceptive to the influence of American multinational corporations."). This trend has led to the phrase "forum shopper's remorse" to describe defendants who were granted dismissals based on *forum non conveniens* only to have a judgment entered against them abroad. Whytock & Robertson, *supra* note 4, at 1447.

110. *See* Whytock & Robertson, *supra* note 4, at 1450; *see also* Casey & Ristroph, *supra* note 109, at 51 ("As plaintiffs achieve victories in Latin American courts, more judgment enforcement cases are likely to find their way to U.S. courts."). Note that in the cases mentioned in Part II, the foreign plaintiffs presumably began their lawsuits in the United States because defendants controlled no assets in the foreign country from which the plaintiff could easily recover any foreign judgment. *See supra* Part II.

111. *See infra* Part III.A.

112. Whytock & Robertson, *supra* note 4, at 1450.

meaningful access runs contrary to a core tenant of the Doctrine—that "forum non conveniens [be] construed as an 'instrument of justice.'"[113] The next section discusses the Doctrine's interaction with the doctrine of judgment enforcement, while the following section briefly reintroduces the idea of protecting "the interest of justice" and examines the Doctrine's implications on issues of comity and foreign relations.

A. The Doctrine of Judgment Enforcement's Interaction with Forum Non Conveniens

The doctrine of *forum non conveniens*, as it is currently applied, does not take into account potential foreign-based judgment-enforcement issues.[114] And it is no wonder that it does not—judgment enforcement was not the focus when the doctrine was formally adopted in the mid-1940s to address venue concerns for domestic disputes.[115] But with the implementation of § 1404(a) to handle those situations and the marked increase in the globalization of the economy and international interaction,[116] what remains is an interaction of these two doctrines that has become a sticking point for foreign plaintiffs.[117]

On the surface, enforcing a foreign judgment does not seem to be problematic. In this regard, thirty-two states have adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) in some form.[118] The UFMJRA makes foreign judgments enforceable in a signatory state, similar to how judgments of sister states are "entitled to full faith and credit."[119] The rationale behind such a

113. Helen E. Mardirosian, *Developments in the Law: Federal Jurisdiction and Forum Selection*, 37 LOY. L.A. L. REV. 1643, 1645 (2004) (quoting Williams v. Green Bay & W. R.R. Co., 326 U.S. 549, 554 (1946)).

114. *See generally* Whytock & Robertson, *supra* note 4, at 1462 (discussing that *forum non conveniens* analysis occurs at the beginning of transnational litigation, while judgment enforcement occurs at the end of the litigation process).

115. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 502 (1947); Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 519 (1947).

116. 14D WRIGHT ET AL., *supra* note 42, § 3828; Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 395 & n.30 (2004) ("*[F]orum non conveniens* quickly became relevant in federal litigation only in cases where the alternative forum was outside of the United States.").

117. *See* Weston, *supra* note 107, at 735.

118. *See id.* at 738–39.

119. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §§ 2–3, 13, pt. II U.L.A. 46, 49 (2002) (stating that "any foreign judgment that is final and conclusive and enforceable where

move is that if the United States is willing to recognize foreign judgments, foreign countries will reciprocate and recognize American judgments.[120]

However, the UFMJRA also provides reasons to *not* recognize a foreign judgment.[121] Section 4 of the UFMJRA provides two types of grounds for nonrecognition: discretionary and mandatory.[122] Discretionary grounds for nonrecognition include insufficient notice, judgment obtained by fraud, public policy concerns, and conflicting judgments.[123] The mandatory grounds include the foreign court's lack of personal or subject-matter jurisdiction.[124] Additionally, if the judgment was "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," then this is mandatory grounds for nonrecognition.[125] Although any of the provisions listed under § 4 of the UFMJRA may be cause for concern for a plaintiff, the impartiality and due-process nonrecognition provisions are where the doctrine of judgment enforcement collides with the doctrine of *forum non conveniens* most fiercely.[126]

As mandatory grounds for nonrecognition, the impartiality and due-process provisions of the UFMJRA *require* courts to evaluate the adequacy of the foreign forum.[127] This entails inquiring into the fairness and impartiality of the foreign judiciary *for a defendant*, not a plaintiff.[128] On the other hand, "federal courts appear loathe to look too closely at the character or the quality of justice in the proposed

rendered" is "enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit").

120. *See* Weston, *supra* note 107, at 739.

121. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4, 13, pt. II U.L.A. 58–59 (2002).

122. *See id.*

123. *See id.* § 4(b)(1)–(6).

124. *Id.* § 4(a)(2)–(3).

125. *Id.* § 4(a)(1). Recall the grounds on which the judgment in *Osorio v. Dole Food Co.* was denied. *See supra* note 28.

126. *See* Whytock & Robertson, *supra* note 4, at 1469–71 (stating that the UFMJRA requires U.S. courts to "evaluate the adequacy of foreign legal systems").

127. *Id.* at 1469; *see* Weston, *supra* note 107, at 742–43.

128. *See* Whytock & Robertson, *supra* note 4, at 1470–71; *see also* Osorio v. Dole Food Co., No. 0722693-CIV, 2009 WL 48189, at *15 (S.D. Fla. Jan. 5, 2009) (noting that the question in a judgment enforcement inquiry is whether the "judicial system is fair and impartial to the . . . [d]efendants, not whether [the foreign forum] would provide the [p]laintiffs with an adequate alternative forum").

alternative forum or the competence of its judicial personnel" for the benefit of the plaintiff when performing the adequate-alternative-forum analysis in a *forum non conveniens* determination.[129] Underscoring this is American courts' reluctance to find the proposed alternative forum inadequate based on "general accusations of corruption, delay, or other problems with the alternative forum's judicial system."[130] As a result, the bar for determining alternate-forum adequacy in a *forum non conveniens* analysis is "quite low"—it will be adequate "as long as the plaintiff will not be deprived of all remedies or subjected to unfair treatment."[131]

Thus, the two doctrines are at odds with each other: *forum non conveniens*'s adequacy analysis does not look at the quality of the alternative forum, while the doctrine of judgment enforcement requires the courts to inquire about the foreign judiciary's "fairness, impartiality, corruption, and other qualities."[132] Because of the discrepancies in the standards used to evaluate the alternative forum at these two discrete points in the litigation, the defendant's seemingly incompatible arguments—one to dismiss for *forum non conveniens* to an adequate alternate forum, the other to find a foreign judgment from that alternative forum unenforceable—can be completely consistent.[133] The defendant is therefore able to take advantage of an "enforcement loophole" to escape being held accountable for harm it was adjudged to have committed.[134]

B. The Intersection Between a Forum Non Conveniens *Dismissal and the Judiciary: The "Interest of Justice," Comity, and Foreign Relations*

Although judges and scholars have made many statements over the years about the purpose of the doctrine of *forum non conveniens*,[135] the Doctrine is perhaps best understood as a means to

129. 14D WRIGHT ET AL., *supra* note 42, § 3828.3.
130. *Id.*
131. *Id.*
132. Whytock & Robertson, *supra* note 4, at 1470.
133. *See id.* at 1449–50.
134. *See* Weston, *supra* note 107, at 735.
135. *See* Whytock & Robertson, *supra* note 4, at 1454–56.

"promote the ends of justice."[136] This is how it was understood in Scotland and England in the nineteenth and early twentieth centuries.[137] This is how it was understood in America when it was adopted by the *Gulf Oil Corp.* Court.[138]

When a court dismisses a transnational case to a foreign forum under the Doctrine, it is deciding that the plaintiff should be denied access to the U.S. judiciary on that action.[139] This, in and of itself, is not problematic and does not run afoul of the "interest of justice" notion. But when a plaintiff whose action is dismissed under the Doctrine is then denied recovery of a foreign judgment on the merits of the claim, it is difficult to believe such a conundrum comports with the Doctrine's intent of promoting the ends of justice.[140]

The intersection of *forum non conveniens* and the doctrine of judgment enforcement also implicates larger, more political concerns—those of comity and foreign relations.[141] For example, "blocking statutes" have begun to sprout up in Latin American countries in response to *forum non conveniens* dismissals of actions brought by their citizens.[142] Although a full discussion of these issues is outside the purview of this Note,[143] suffice it to say that comity and foreign relations are important interests that would also benefit

136. *Id.* at 1455; *see, e.g.*, Can. Malting Co., v. Paterson S.S., Ltd., 285 U.S. 413, 423 (1932) ("Courts of equity and of law . . . occasionally decline, in the interest of justice, to exercise jurisdiction . . . .").

137. *See supra* notes 34–36 and accompanying text.

138. *See supra* note 47 and accompanying text.

139. Whytock & Robertson, *supra* note 4, at 1454.

140. Besides the obvious hardship this places on the plaintiff trying to recover for harms inflicted on him or her, it also leads to judicial inefficiency. *See, e.g.*, Chevron Corp. v. Naranjo, 667 F.3d 232, 234 n.1 (2d Cir. 2012) ("An underinclusive Westlaw search for Chevron or Texaco & Ecuador & 'Lago Agrio' yields fifty-six results, all of which deal directly with this litigation."). Such judicial inefficiency can hardly be said to "promote the ends of justice."

141. Comity refers to the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience." BLACK'S LAW DICTIONARY 304 (9th ed. 2009).

142. *See* Casey & Ristroph, *supra* note 109, at 26–40.

143. For discussions on the issues of comity and foreign relations, see Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010); Casey & Ristroph, *supra* note 109; Virginia A. Fitt, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT'L L. 1021 (2010); Jernigan, *supra* note 78.

from restructuring the interaction of the *forum non conveniens* and judgment-enforcement doctrines.[144]

The foregoing suggests that reform measures are needed to bring the Doctrine into modern times and make it workable in our increasingly globalized world in which American corporations frequently look to, and use, foreign markets to support their business affairs.[145] With this as a fact of the times we live in, it stands to reason that more foreign plaintiffs will file suit against these American corporations to redress any harms that befall them while our corporations conduct business in their countries.[146] The next Part will venture to address the "access to justice" gap that can occur in transnational-litigation cases in a manner that preserves the Doctrine's original focus—the "interest of justice."[147]

IV. A MULTIFACETED SCHEME: IMPARTIAL EVALUATION OF THE FOREIGN FORUM, STAYING THE ACTION, AND MONITORING THE FOREIGN PROCEEDING

Many legal scholars and law school students have considered the interaction between the doctrine of *forum non conveniens* and the doctrine of judgment enforcement.[148] Some have suggested aggressive dismissal conditions, or stipulations, as a way to avoid "boomerang litigation."[149] However, even if the parties meet any

144. Briefly put by Justice Doggett of the Supreme Court of Texas, "[C]omity requires U.S. courts to hold U.S. companies accountable for torts committed abroad[,]" and this is "'best achieved by avoiding the possibility of incurring the wrath and distrust of the Third World'"—in other words, by not "dismissing these cases." Casey & Ristroph, *supra* note 109, at 43 (quoting Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 687 (Tex. 1990)).

145. *See* Dante Figueroa, *Are There Ways Out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?*, 1 BUS. L. BRIEF 42, 42 (2005) (describing the effects of globalization).

146. *See* Whytock, *supra* note 105, at 490–91. However, not everyone considers an increase in transnational litigation to be a foregone conclusion. *Id.* at 533 (suggesting that transnational litigation is not yet at a point that it is "likely to have a net negative effect on foreign relations or economic welfare").

147. Whytock & Robertson, *supra* note 4, at 1450.

148. *See, e.g.*, Cortelyou Kenney, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CAL. L. REV. 857 (2009); Weston, *supra* note 107; Whytock & Robertson, *supra* note 4.

149. *See, e.g.*, Kenney, *supra* note 148, at 865–66 (suggesting aggressive dismissal stipulations as a way to solve the interaction between the two doctrines without having to change either doctrine as it is currently applied). Kenney also discusses the idea of "return clauses"—dismissal conditions that permit the district court to resume jurisdiction if a catastrophic event occurs in the foreign forum (like civil war)—as a way to "provide backstops against faulty

dismissal conditions, it is still possible that foreign judgments may not be recognized in a judgment-enforcement proceeding. Others have proposed changes of judicial estoppel or conditional consent to enforcement, which would place the risk of changes in the foreign forum's judicial adequacy on the defendant.[150] Still others have suggested excluding at enforcement proceedings the relitigation of issues considered during the *forum non conveniens* stage.[151] All of these suggestions have one thing in common—the original suit before the district court has been dismissed.

In contrast, this Note suggests a scheme for handling motions to dismiss for *forum non conveniens* in the transnational-litigation context that does not include dismissing the original action should an alternate forum be the more appropriate location for litigating the matter. By employing safeguards from the moment a motion is filed,[152] through a motion's determination,[153] and after a motion is granted,[154] the court can protect the "interest of justice" in transnational-litigation matters.

This Note suggests a three-pronged system of safeguarding the "interest of justice" that (1) incorporates the use of a master to evaluate the proposed alternate forum; (2) requires courts to stay the action rather than dismiss it; and (3) has the master conduct postmotion functions, such as the investigation and enforcement of decrees, in cases where there have been successful *forum non conveniens* motions. The ultimate goal of this approach is that if the district court finds reason to reinstate the original proceeding at any time during the foreign proceeding, it may do so to protect the "interest of justice."

process." *Id.* at 902. However, these provisions can be controversial, and it is unclear whether they comport with Supreme Court precedent on the Doctrine. *See id.* at 902 & n.214.

150. *See* Whytock & Robertson, *supra* note 4, at 1500–09. A judicial-estoppel solution requires "applying similar adequacy standards" under both doctrines—a solution that would require changing one, or both, doctrines. *Id.* at 1502. The other solutions noted in the text still allow for nonrecognition at the judgment-enforcement stage should the due-process or impartiality requirements of the UFMJRA not be met. *Id.* at 1508–09.

151. *See, e.g.*, Weston, *supra* note 107, at 762 (noting the theory of claim preclusion, or *res judicata*).

152. *See infra* Part IV.A.

153. *See infra* Part IV.B.

154. *See infra* Part IV.C.

A. First Prong: Appointing a Master to Impartially Evaluate the Foreign Forum

Historically, trial courts have relied solely on parties' briefs and declarations when considering a motion to dismiss for *forum non conveniens*.[155] However, this does not provide the court with an unbiased perspective on the proposed alternative forum given the adversarial nature of our judicial system.[156] Federal Rule of Civil Procedure (FRCP) 53 provides a vehicle by which district courts can achieve this unbiased perspective—a master.[157] A court appoints a master to perform duties it outlines—largely those having to do with pre- and posttrial matters, although not exclusively so—when it needs particular assistance.[158]

Masters have been used in federal courts since the beginning of the nation, and their powers and duties have been confirmed by judicial precedent.[159] FRCP 53 authorizes masters to be appointed by a district judge[160] to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[161] Such matters can include, but are not limited to, "the determination of foreign law," "discovery related matters that under normal circumstances could be addressed by a judge," and posttrial enforcement of judgments or

155. *See, e.g.*, Malay. Int'l Shipping Corp. Berhad v. Sinochem Int'l Co., No. Civ.A. 03-3771, 2004 WL 503541 (E.D. Pa. Feb. 27, 2004) (citing parties' briefs in the Memorandum and Order granting Sinochem's motion to dismiss for *forum non conveniens*).

156. The Author recognizes that there can be no *truly* unbiased perspective, even when it comes from a nonparty to the litigation who presents "all" sides of an issue, simply because any person's background and experiences will shape how he or she understands and conveys information.

157. *See* FED. R. CIV. P. 53.

158. 9C WRIGHT ET AL., *supra* note 42, § 2601. For a thorough exegesis on the history of the master in the American legal landscape, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

159. 9C WRIGHT ET AL., *supra* note 42, § 2601; *see, e.g.*, *In re* Peterson, 253 U.S. 300, 310–14 (1920) (using the term "auditor" instead of master).

160. *See* Satyam Computer Servs., Ltd. v. Venture Global Eng'g, LLC, 323 F. App'x 421, 430–31 (6th Cir. 2009) (deciding that the district court did not abuse its discretion by appointing a special master with knowledge of Indian law or adopting the special master's findings); Hofmann v. EMI Resorts, Inc., 689 F. Supp. 2d 1361, 1365 (S.D. Fla. 2010) (appointing a special master in order to "sort all of [the evidence] out"). The district court may act on its own motion to appoint a master. 9C WRIGHT ET AL., *supra* note 42, § 2603.

161. FED. R. CIV. P. 53(a)(1)(C).

decrees and investigations.[162] Typically, a master "conducts himself or herself as would a district or magistrate judge."[163] A master's powers over a particular matter can be wide-ranging and include regulating all proceedings, compelling and taking evidence, and imposing sanctions against noncompliant parties.[164] In sum, a master may "take all measures necessary or proper for the efficient performance of the duties assigned to him or her."[165]

Although FRCP 53 places some limits on the scope of why a master may be appointed,[166] a district court's discretion in appointing masters is broad.[167] For example, masters have been appointed for their technical expertise in patent law,[168] special knowledge of foreign law,[169] and expertise in ERISA law.[170] Masters have also been appointed to monitor, investigate, and enforce judgments,[171] as well as supervise compliance with stipulations.[172]

Appointing a master to conduct an evaluation of a proposed foreign forum seems to fall within what has traditionally been approved by courts.[173] *Forum non conveniens* calls upon the court to make determinations regarding the adequacy of a foreign forum, in addition to weighing a set of factors that may include "questions as to the enforcibility [sic] of a judgment if one is obtained."[174] The "enforceability" factor is one that may be more appropriately handled by a master with special knowledge of the foreign forum and

162. 9C WRIGHT ET AL., *supra* note 42, §§ 2602–02.1.

163. *Id.* § 2602.2.

164. FED. R. CIV. P. 53(c) ("Unless the appointing order directs otherwise . . . .").

165. 9C WRIGHT ET AL., *supra* note 42, § 2609.

166. *See* FED. R. CIV. P. 53(a)(1).

167. 9C WRIGHT ET AL., *supra* note 42, § 2602.1 ("[J]udicial discretion and flexibility of use remain the hallmarks of practice under [FRCP] 53.").

168. *See* Smart Parts, Inc. v. WDP Ltd., No. 02-1557-KI, 2005 WL 35834, at *3 (D. Or. Jan. 7, 2005).

169. *See* Satyam Computer Servs., Ltd. v. Venture Global Eng'g, LLC, 323 F. App'x 421, 430–31 (6th Cir. 2009).

170. *See* Hatteberg v. Red Adair Co., Emps. Profit Sharing Plan & Its Related Trust, 79 F. App'x 709, 719–20 (5th Cir. 2003) (approving the appointment of two special masters due to the "difficulty of the ERISA issues in the case").

171. *See* Sukumar v. Direct Focus, Inc., 349 F. App'x 163, 164–65 (9th Cir. 2009).

172. *See* G.G. Marck & Assocs., Inc. v. Peng, No. 3:05 CV 7391, 2006 WL 1793252, at *3 (N.D. Ohio June 27, 2006).

173. *See supra* notes 158–165 and accompanying text.

174. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506–08 (1947); *see also supra* notes 55–56 (listing the private and public factors to be considered).

foreign law, as district court judges are generalists[175] and not experts on foreign judiciaries.[176] By appointing a master to further delve into the adequacy of the alternate forum and any enforceability concerns, district court judges can make a more informed decision regarding a motion to dismiss for *forum non conveniens* and the likelihood of future judgment-enforcement issues should the motion be granted. The more searching inquiry that a master would be able to provide in *forum non conveniens* analysis would go a long way toward meeting the Doctrine's original goal of serving the "interest of justice."[177]

Appointing a master also brings up the question of compensation, but FRCP 53 accounts for that reality.[178] The court may proportionally assign the master's compensation to one or more parties based on the degree to which each party is responsible "for the reference to [the] master."[179] The amount to be provided to the master "should be liberal, but not exorbitant" in order to "adequately remunerate[]" the master for "execut[ing the court's] decrees thoroughly, accurately, impartially, and in full response to the confidence extended."[180]

The question is then which party or parties pay for the master. The most logical conclusion is the movant in the motion to dismiss for *forum non conveniens* (in all likelihood, the defendant). This will normally be the party "more responsible . . . for the reference to [the] master."[181] And this makes sense because the plaintiff is the one who

175. *See generally* Diane P. Wood, Judge, U.S. Court of Appeals for the Seventh Circuit, Generalist Judges in a Specialized World, Speech at the Eighth Annual Judge Irving L. Goldberg Lecture Series, (Feb. 11, 1997), *in* 50 SMU L. REV. 1755, 1756–59, 1766 (1997) (characterizing federal district court judges as generalists).

176. *See* 13 WRIGHT ET AL., *supra* note 42, § 3508 (outlining the specialized courts created by Congress).

177. *Gulf Oil Corp.*, 330 U.S. at 504 (quoting Can. Malting Co. v. Paterson S.S., 285 U.S. 413, 422–23 (1932)).

178. *See* FED. R. CIV. P. 53(g).

179. FED. R. CIV. P. 53(g)(2)–(3); *see also* Holden v. S.S. Kendall Fish, 395 F.2d 910, 913 (5th Cir. 1968) (affirming the assessment of the master's fee against the appellants); Heiberg v. Hasler, 1 F.R.D. 735, 737 (E.D.N.Y. 1941) (taking into account the parties' financial situations when deciding to apportion the master's fees to the more affluent defendant as opposed to the plaintiff).

180. Newton v. Consol. Gas Co., 259 U.S. 101, 105 (1922).

181. FED. R. CIV. P. 53(g)(3).

chose the district court as his or her preferred forum and the defendant-movant is the one asking to go elsewhere.[182]

It follows from the discussion of FRCP 53 above that the court could appoint a master to provide assistance in a *forum non conveniens* determination. The master would provide specialized knowledge of the foreign judiciary in question to ensure that the court renders a decision that comports with the "interest of justice."[183] If the master's evaluation falls on the side of concern about future judgment enforcement or the practices and impartiality of the foreign judiciary (UFMJRA recognition concerns), a district court judge may want to exercise his or her discretion to deny the motion to dismiss and proceed to trial. If the district court disagrees with the master's findings, or if the master instead determines that the foreign judiciary does meet the "interest of justice," then the court should *stay* the action, as opposed to *dismissing* it. Staying an action on grounds of *forum non conveniens* is the subject of the next section.

B. Second Prong: Staying, Rather than Dismissing, the Action

It should be no huge secret where the defendant likely retains assets at the time the defendant files the motion to dismiss for *forum non conveniens*.[184] If the proposed foreign forum is a country where the defendant has no assets, the court should recognize that any future monetary judgment for the plaintiff will have to be enforced outside of the proposed foreign forum. In all likelihood, since the plaintiff filed in an American court, the defendant will have assets in

182. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255–56 (1981) (discussing the deference afforded to a plaintiff's choice of forum).

183. Stephen B. Burbank offers a biting criticism of American courts' understanding of foreign judiciaries that further warrants the specialized knowledge of a master. Professor Burbank states:

> American courts have no coherent or consistent view of the role or weight, if any, that should be given in *forum non conveniens* analysis to the constellation of legal rules and arrangements that determines whether a putative plaintiff has real, as opposed to theoretical, access to court and to means of proof essential to gain a remedy.

Burbank, *supra* note 116, at 397. Moreover, should the motion to dismiss not be denied, Professor Burbank's observation supports granting a stay, rather than a dismissal, so that the court may monitor the situation abroad to ensure that a plaintiff is "getting a fair deal." *See infra* Part IV.B.

184. For instance, the actions described in Part I were all brought against American corporations whose principal places of business were in the United States. *See supra* Part I.

America and a judge can foresee that judgment enforcement in America may become a contested issue down the road if there are questions as to the adequacy of the foreign judiciary. Thus, the easy scenario exists when the master's findings suggest that the foreign forum may not be suitable for future potential judgment enforcement: the court should deny the motion and the parties should continue on to trial in the district court. But what if the trial judge grants the motion to dismiss? Doing so relieves the district court of jurisdiction over the matter. The answer, instead, should be to conditionally stay the action.

A stay is "[t]he postponement or halting of a proceeding, judgment, or the like."[185] By conditionally staying an action, the district court retains jurisdiction over the case while it proceeds in a foreign judiciary until certain conditions are met, like fulfilling any judgment in favor of the plaintiff.[186] Thus, if the defendant attempts to invoke the doctrine of judgment enforcement as a "loophole" mechanism to escape liability, the staying court can resume proceedings in the matter.[187]

The following subsections examine California's practice of staying an action subject to a motion to dismiss for *forum non conveniens*, as opposed to dismissing the action, and suggest that the federal courts adopt a similar procedure.

185. BLACK'S LAW DICTIONARY 1548 (9th ed. 2009).

186. It is not unusual for courts to include conditions, such as the defendant waiving personal jurisdiction in the foreign forum or any applicable statute-of-limitations defense, under a stay *or* a dismissal. *See* Sussman v. Bank of Isr., 801 F. Supp. 1068, 1079 (S.D.N.Y. 1992) (conditioning the dismissal for *forum non conveniens* on the defendant waiving any statute of limitations defense in the foreign forum); Stangvik v. Shiley, Inc., 819 P.2d 14, 17 (Cal. 1991) ("[The trial court] stayed the actions, and retained jurisdiction to make such further orders as might become appropriate. The order [staying the action] was subject to seven conditions, with which defendants agreed to comply."). The Author recommends that courts should impose another condition and stay an action until the defendant is relieved of liability, either through fulfilling any judgment entered against it or by receiving a judgment in its favor by the foreign judiciary.

187. *See infra* note 208 and accompanying text.

1. *Forum Non Conveniens* in California: *Stangvik v. Shiley, Inc*.[188]

Although the doctrine of *forum non conveniens* was first applied in California in the mid-1950s,[189] the seminal case describing the Doctrine in California is *Stangvik v. Shiley, Inc.*[190] The case involved foreign plaintiffs pursuing actions against American corporations in a California state court.[191] The Supreme Court of California granted review of the actions to "address the question of the appropriate standards to be applied in deciding whether a trial court should grant a motion based on the doctrine of forum non conveniens when the plaintiff [is] a resident of a foreign country.[192]

The *Stangvik* court clearly articulated a two-pronged test for determining whether to grant a motion based on *forum non conveniens*.[193] Largely relying on the U.S. Supreme Court's analysis in *Piper Aircraft Co.*,[194] the California supreme court instructed courts to conduct a threshold inquiry to determine if the alternate forum is "suitable" and then balance the private and public interests at stake.[195] Ultimately, the Supreme Court of California affirmed the lower courts' decisions to grant the defendants' motion by staying the action.[196]

188. 819 P.2d 14 (Cal. 1991). Families of a deceased Swedish patient and a deceased Norwegian patient filed a products-liability suit against defendants Shiley, Inc. and its parent company in a California superior court for manufacturing allegedly faulty heart-valve implants. *Id.* at 16. Defendants moved to dismiss or stay the actions on the ground of *forum non conveniens*. *Id.* The trial court stayed the action provided that defendants stipulated to a number of conditions, including submission to the jurisdiction of the respective foreign forums. *Id.* at 17 & n.2. The appellate court affirmed, as did the California supreme court. *Id.* at 17.

189. *See id.* (citing Price v. Atchison, T. & S.F. Ry. Co., 268 P.2d 457 (Cal. 1954)).

190. Stangvik v. Shiley, Inc., 819 P.2d. 14 (Cal. 1991).

191. *Id.* at 16.

192. *Id.*

193. *Id.* at 17.

194. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

195. *Stangvik*, 819 P.2d at 17–19. As described by the California supreme court in *Stangvik*, suitability is based on "whether an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant," *id.* at 18 n.3, while the private and public interests to be balanced are similar to those enumerated in *Gulf Oil Corp. Id.* at 17–18 (citing to *Piper Aircraft Co.*, 454 U.S. at 259–61, and Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–09 (1947)).

196. *Id.* at 27. Of note is the trial court's decision to stay the actions as opposed to dismissing them. *Id.* at 17. Despite finding the alternative forums to be more appropriate for resolving the actions, the trial court stayed the actions in order "to make such further orders as *might become appropriate*." *Id.* (emphasis added).

2. *Forum Non Conveniens* in California: *Guimei v. General Electric Co.*[197]

A more recent California case also instructive on addressing motions to dismiss on the ground of *forum non conveniens* is *Guimei v. General Electric Co.*[198] It similarly involved an American defendant-corporation and foreign plaintiffs.[199] The California statute[200] authorizing dismissal of an action to another forum in the interest of "substantial justice" also allows for the court to stay the action.[201] Like the court in *Stangvik*, the trial court in *Guimei* ordered the consolidated actions stayed.[202] This decision was later affirmed by a California appellate court.[203]

In reaching its decision, the trial court engaged in the analysis required by *Stangvik*—it determined that both prongs of the *forum non conveniens* analysis were met in the consolidated actions.[204] As discussed in Parts II.A and II.B of this Note, a similar analysis is typical in federal *forum non conveniens* cases.[205] However, unlike federal *forum non conveniens* cases, in which dismissals seem to be the norm should the motions be granted,[206] the California supreme

197. On November 21, 2004, China Eastern Yunnan Airlines flight MU5210 crashed in Inner Mongolia, killing all passengers, crew members, and two bystanders on the ground. Guimei v. Gen. Electric Co., 91 Cal. Rptr. 3d 178, 182 (Cal. Ct. App. 2009). Subsequently, plaintiff Guimei, a relative of a crash victim, along with other plaintiffs, filed suit against defendants General Electric, Bombardier, Bombardier Aerospace, and China Eastern Airlines Company in a Superior Court of California for the County Los Angeles. *Id.* The cases were consolidated and defendants moved to dismiss or, in the alternative, stay on the ground of *forum non conveniens*, claiming the appropriate place for trial was China. *Id.* at 183. As part of their motion, each defendant made "commitment[s]" (or stipulations) to several conditions should the motion have been granted. *Id.* The trial court granted a conditional stay of the consolidated actions to permit the proceedings in China and scheduled status conferences for every six months to monitor the progress of the Chinese proceedings. *Id.* The California Court of Appeals affirmed the conditional stay. *Id.* at 193.

198. 91 Cal. Rptr. 3d 178 (Cal. Ct. App. 2009).

199. *Id.* at 182.

200. CAL. CIV. PROC. CODE § 410.30 (West 2011).

201. *Id.* § 410.30(a).

202. *Guimei*, 91 Cal. Rptr. 3d at 183–85.

203. *Id.* at 193.

204. *See* Respondents' Brief at 11–12, Guimei v. Gen. Electric Co., 91 Cal. Rptr. 3d 178 (Cal. Ct. App. 2009) (Nos. B201016, B201021, B201023, B201012).

205. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

206. *See, e.g.*, Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007) (dismissing the action); *Piper Aircraft Co.*, 454 U.S. 235 (dismissing the action).

court seems to view dismissal as the exception.[207] In *Guimei*, as in any case in which a stay is granted, the stay allowed the trial court to retain jurisdiction over the consolidated actions, enabling it to resume the proceedings if the foreign actions were "unreasonably delayed" or "fail[ed] to reach a resolution on the merits."[208] Thus, the trial court could have revisited the question of whether to try the consolidated actions if the defendants did not follow through with the stipulations they made or if the foreign judiciary did not accept jurisdiction over the foreign action.[209]

The appellate court also noted that if the plaintiffs had "thwart[ed]" the foreign proceedings, the trial court had the option to lift the stay and grant a full dismissal of the California action.[210] This makes sense as an appropriate "safety valve" for the defendants who brought the *forum non conveniens* motion and who likely made various stipulations to submit to the jurisdiction of the foreign forum. By including this "safety valve," plaintiffs, who face litigating in a forum not of their choosing, are discouraged from impeding the foreign proceeding in an attempt to invoke the trial court's discretion to remove the stay and try the action. In order to preserve any safeguard that a stay offers plaintiffs, the plaintiffs must also do their best to see the foreign proceeding to its conclusion.

Following the edicts set forth by the *Stangvik* court, the *Guimei* court's decision to employ a conditional stay with periodic reviews of the status of the foreign action honored the fundamental notions underlying the Doctrine while protecting, to the best of the court's

207. Archibald v. Cinerama Hotels, 544 P.2d 947, 950 (Cal. 1976) ("[E]xcept in extraordinary cases a trial court has no discretion to dismiss an action brought by a California resident on grounds of forum non conveniens"). It should be noted that this "rule" assumes that the plaintiff is a California resident. *Id.* at 950–51. However, the *Archibald* court goes on to state that "[i]n considering whether to stay an action, in contrast to dismissing it, the plaintiff's residence is but one of many factors which the court may consider." *Id.* at 952. California courts also have taken up the general issue of non-California residents' choice of forum in the *forum non conveniens* analysis, indicating that although a foreign plaintiff's choice of forum is not a "substantial factor," it does deserve some deference. *See* Stangvik v. Shiley Inc., 819 P.2d 14, 20 (Cal. 1991); Ford Motor Co. v. Ins. Co. of N. Am., 41 Cal. Rptr. 2d 342, 346 (Cal. Ct. App. 1995).

208. *Archibald*, 544 P.2d at 950 (noting that a court granting a *forum non conveniens* stay retains jurisdiction and "can protect . . . the interests of the [litigants]," while a court granting a *forum non conveniens* dismissal loses jurisdiction and "deprive[s] itself of the power to protect the interests of the [litigants]").

209. *Guimei*, 91 Cal. Rptr. 3d at 191–92 (noting that the trial court's reviews of the Chinese action were limited to procedural aspects alone and not the merits of the case).

210. *Id.* at 192.

abilities, the plaintiffs' "day in court." Ultimately, the power to resume the original proceedings provides an immeasurable safeguard against potential problems that litigants may encounter, or may endeavor to create, in a foreign forum.

C. Third Prong: Masters Monitoring the International Action

Once a plaintiff refiles an action in a foreign judiciary, how does the court monitor the adjudication process abroad to ensure the conditions of the stay are being upheld? Again, as before, the answer is a master.

As mentioned earlier, courts can charge masters with such posttrial duties as decree enforcement and investigation.[211] FRCP 53 provides the mechanism by which the court has the authority to reappoint a master to oversee these precise duties.[212] By amending the initial order that approved the master to evaluate the foreign forum before the trial court ruled on the motion to dismiss for *forum non conveniens*, the court can extend the master's duties to include monitoring the foreign action to ensure the stay's conditions are met.[213] In fact, the court could add amending the order as one of the conditions of the conditional stay.[214]

Having a master with special knowledge of the foreign judiciary monitor the progress of the foreign proceeding allows the court to make highly informed decisions regarding the stay.[215] After a court amends the original order, the master then would be able to investigate the posttrial proceedings.[216] The master's duties would not include interfering with the foreign proceedings (which would implicate issues of comity), but rather would include monitoring and evaluating what is occurring abroad and reporting back as a neutral party to the staying court. Thus, the staying court would be able to

211. 9C WRIGHT ET AL., *supra* note 42, §§ 2602–02.1.

212. *See* FED. R. CIV. P. 53(b)(4) ("The order may be amended at any time after notice to the parties and an opportunity to be heard.").

213. 9C WRIGHT ET AL., *supra* note 42, § 2602.1.

214. This is partially because further payment would need to be secured for the master's amended duties.

215. *See, e.g.*, Stangvik v. Shiley, Inc., 819 P.2d 14, 17 (Cal. 1991) (staying the actions in order "to make such further orders as *might become appropriate*" (emphasis added)).

216. *See* FED. R. CIV. P. 53(b)(1); 9C WRIGHT ET AL., *supra* note 42, § 2609 (noting that the order issued by the court may specify or limit the master's powers).

make an informed decision as to whether the conditions of the stay are being met, if the conditions need to be modified, or if the action needs to be resumed in the staying court.

These three safeguards all work toward one end—ensuring that the "interest of justice" is served when a federal court declines jurisdiction over a matter properly before it. The proposed scheme prevents defendants from abusing an "enforcement loophole" that has arisen.[217] It assures that a defendant properly brought before a court of law does not escape adjudication.

V. CONCLUSION

By adopting a procedure to stay, rather than dismiss, an action following a motion to dismiss for *forum non conveniens*, as California has done, and by enhancing the Doctrine with additional safeguards as suggested above, the "interest of justice" stands a better chance of not falling victim to the competing doctrines of *forum non conveniens* and judgment enforcement. The proposed process of (1) appointing a master to impartially evaluate the foreign forum, (2) staying the action rather than dismissing it, and (3) having a master monitor the international action encourages a more searching inquiry in the *forum non conveniens* determination stage. It thereby preserves judicial resources should future enforcement problems be detected early on by an individual with special knowledge of the foreign judiciary. It also preserves the "interest of justice" by giving the staying court the power to resume the proceeding should the action abroad implicate impartiality or due-process concerns, as well as if judgment enforcement becomes an issue. Furthermore, it does not require any alterations to the doctrines of *forum non conveniens* or judgment enforcement as they are currently applied. With the ever-increasing interaction of the world population and national economies, failure to take this necessary step in addressing transnational-litigation concerns will result in less and less foreign reciprocity honoring American judgments and, ultimately, will result in the unnecessary degradation of America's foreign relations.

217. *See* Weston, *supra* note 107, at 758–59.